Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

MARY DURHAM,

PETITIONER,

VS.

XEROX CORPORATION,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

MARY DURHAM,

PETITIONER,

VS.

XEROX CORPORATION,

RESPONDENT.

QUESTIONS PRESENTED

1. Once a prima facie case of race discrimination has been established as a matter of law, can the same be defeated without employer proffering a reason for its conduct?

2. Did the appellate court err in considering the abuse of judicial discretion by the trial court in considering the striking of the Title VII claim?

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OPINIONS BELOW

The United States District Court for the Western District of Oklahoma granted summary judgment in favor of Xerox Corporation on October 29, 1992. (Appendix "A" and "B"). Durham thereafter filed her notice of appeal on November 25, 1992 to the United States Court of Appeals for the Tenth Circuit. On February 24, 1994, the Appeals Court affirmed the decision of the District Court. (Appendix "C"). In so doing, the Tenth Circuit Court of Appeals held that Durham failed to offer sufficient evidence to support a finding that Xerox intentionally discriminated against her because of her race. The Court further held that the district court did not abuse its discretion by striking Durham's amended complaint. Durham timely filed a

petition for rehearing. The petition for rehearing was denied by order entered March 15, 1993. (Appendix "D").

STATEMENT OF JURISDICTION

The dates of the judgments sought to be reviewed are February 24, 1994 and March 15, 1994. The court from which relief is sought is the United States Court of Appeals for the Tenth Circuit. This Court has jurisdiction pursuant to 28 United States Code § 1254.

STATUTORY PROVISIONS

The statutory regulations involved in this case are Rules 15 and 56 of the Federal Rules of Civil Procedure and 42 U.S.C. § 2000e-5(f)(1). The pertinent texts of each are set forth in Appendix "E," "F" and "G" respectively.

STATEMENT OF THE CASE

The basis for federal jurisdiction

in the court of first instance was a violation of 42 U.S.C. § 1981 and 42 U.S.C. § 2000e, et seq. Petitioner, Mary Durham, Appellant below, Plaintiff at trial court level, (hereinafter referred to as "Durham" or "Petitioner") was employed by Defendant-Appellee-Respondent, Xerox Corporation.

Durham has been employed by Xerox since 1976 and during that time she has worked in various capacities in the field of accounting. In 1986, Durham was promoted to Senior Accounting Analyst and was given supervisory and managerial responsibility over less senior and less qualified accountants and accounting analysts in her department. Although the job description for Senior Accounting Analyst did not contain a duty to supervise and manage, Durham did in fact

have supervisory responsibilities.

The managerial and supervisory duties which Durham began to perform in 1986 were the same duties as the position of Controller. From 1986 until 1991 Durham trained two less senior and less experienced in the controller position. In December, 1991, Xerox promoted Jan Hibbs to the position of controller. Hibbs had no prior experience at the Oklahoma City plant and is less senior than Durham. Because of the unique mission of the Oklahoma City plant, Durham was better able than Hibbs to oversee the fiscal and financial responsibilities at the Oklahoma City plant.

On January 20, 1990, the former Controller at the Oklahoma office resigned his position. Durham had

experience in all phases of the operations at Xerox and was qualified to replace the resigning Controller. Durham expressed her desire for the Controller position; however Xerox has no formal posting or application procedures for the Controller position. Durham was not selected for the position.

Xerox does not openly post vacancies for its upper level management positions. Instead, Xerox uses a word or mouth advertising method for the position of Controller and makes promotion decisions without benefit of objective or measurable standards for seniority or performance. Durham contended that she had been subjected to race discrimination by Xerox' failure to promote her to the Controller position and further contended that Xerox' failure to post resulted in

an under-representation of Black employees in that position.

Xerox has no objective criteria for the position of Controller except that the employee must have ten (10) years experience and a Master of Business Administration degree is preferred. Xerox relies heavily upon subjective criteria in its promotion procedures. The characteristics which Xerox considers in its promotion decisions include leadership, decision making, communication and conceptual skills.

Xerox moved for summary judgment and alleged, inter alia, that Durham failed to prove a case of disparate impact. Xerox' motion contained several other subsidiary arguments concerning the availability of punitive and compensatory damages under § 1981, the viability of

Durham's reprisal allegations and the availability of a jury trial in the matter.

The District Court restricted its decision to the disparate impact argument raised by Xerox but granted summary judgment on Durham's entire cause of action.

ARGUMENT AND AUTHORITIES

Petitioner seeks review of this case because the Tenth Circuit has rendered a decision in conflict with this Court and because the Tenth Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

PROPOSITION I

ONCE A PRIMA FACIE CASE OF RACE DISCRIMINATION HAS BEEN ESTABLISHED, THE BURDEN SHIFTS TO EMPLOYER

The Circuit Court never independently addressed the issues surrounding the 1990 promotion. The Circuit Court consolidated the 1990 promotion with the 1991 promotion criteria. If Durham is to have her contentions properly reviewed, it is crucial that the 1990 promotion be separately analyzed. If this is done, notwithstanding the findings of the appellate court, this Court will find that Xerox failed to come forward with any evidence to explain the reason for Durham's non-selection. The Circuit Court attempts to validate the decision of the Trial Court by making assumptions of what the Trial Court thought and what

Xerox thought concerning the non-selection of Durham for the 1990 promotion. This trend of jurisprudence runs counter to well founded theories and principles of law promulgated by this Court.

Durham raised two separate and distinct unlawful employment practices: First, the January 1990 vacancy. This vacancy was filled without affording Durham an opportunity to compete. She was not considered at all --- no counseling or any communication, as well as a failure to post. Durham trained the successful candidate after he had been awarded the position. The McDonnell Douglas Corp. v. Green "prima facie" elements were satisfied and remained uncontested throughout all of the pleadings --- as to the January 1990

promotion only. Second, Durham was non-selected for the December 1991 vacancy which is the Title VII claim that was stricken; however, it is that 1991 claim that Xerox articulated a "business reason." However, Xerox attempts to utilize the same "business reason" proffered in the 1991 claim for its 1990 decision; but, the record is void of any such articulation; and, except for general denial in its answer, the alleged facts offered by Durham for the 1990 non-selection remains uncontested.

The only issue before the Tenth Circuit of unlawful employment practice was the January 1990 promotion. The 1991 promotion is in fact the Title VII charge, which was stricken.

ST. MARY'S APPLICATION

St. Mary's Honor Ctr. v. Hicks, 113

S.Ct. 2742 (1993), did nothing more than reemphasize the burden of persuasion remaining with plaintiff, irrespective of the doubtfulness of defendant's proffered business reason. Id. at 2745. In the case at bar, it is undisputed that Durham is Black; was qualified for the position filled in January 1990; was not afforded an opportunity to compete for said position; the position was filled by a less qualified white; and, the non-posting of said vacancy adversely impacted Durham. These allegations of Durham were not contested by Xerox. However, Xerox' references to the record, including deposition testimony, went to the 1991 non-selection of Durham. These facts were not refuted or denied by Xerox at any time.

In the case at bar, the issue is not

concerning the "falsity of the employer's explanation..." as cited in St. Mary's, (Id. at 2745); instead, we address omission of an essential element of the employer's obligation --- that is the:

> burden of producing an explanation to rebut the prima facie case --- i.e., the burden of "producing evidence" that the adverse employment actions were taken "for a legitimate, nondiscriminatory reason." Burdine, 450 U.S., at 254. "[T] defendant must clearly set forth, through the introduction of admissible evidence," reasons for its actions which, if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the employment action. Id., at 254-255, and n.8. It is important to note, however, that although the McDonnell Douglas presumption shifts the burden of production to the defendant, "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff," id. at 253.
>
> Id. at 2747.

How can summary judgment lie when Durham established a "prima facie" case as to the January 1990 vacancy and Xerox

> failed to meet its burden of production --- i.e., has failed to introduce evidence which, taken as true, would permit the conclusion that there was a nondiscriminatory reason for the adverse action. In that event, the court must award judgment to the plaintiff as a matter of law...."
>
> <u>If the defendant has failed to sustain its burden but reasonable minds could differ as to whether a preponderance of the evidence establishes the facts of a prima facie case, then a question of fact does remain, which the trier of fact will be called upon to answer.</u>
>
> Emphasis ours, <u>Id</u>. at 2748, Note 3.

However, Xerox did not produce one shred of evidence in opposition to the 1990 non-promotion charge.

> <u>The factfinder's disbelief</u> of the reasons put forward by the defendant (particularly if

> disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination.
> Emphasis ours, Id. at 2749.

> Thus, the effect of failing to produce evidence to rebut the McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), presumption is not felt until the prima facie case has been established, either as a matter of law (because the plaintiff's facts are uncontested)....
> Emphasis ours, Id. at 2749, Note 3.

Surely if the Appellate Court had considered the record as presented, It would have found: (1) that a prima facie case had been established; and, (2) that Xerox acquiesced and thereby failed to explain any reason for its conduct. At this point, the "fact finder's disbelief" coupled "with the elements of the prima facie case" may suffice to show intentional discrimination. Id. at 2749.

The Appellate Court seems to have been misled and thereby erroneously assumed that Xerox' evidence in support of its motion for summary judgment applied to both claims, 1990 and 1991, when in fact the record is void of any reference to the 1991 claim. Allegations of not posting and downgrading of performance evaluation were applicable to the 1991 promotion, as no one told Durham anything as to the 1990 claims. In St. Mary's at 2750 this Court said: "(finding of pretext does not mandate finding of illegal discrimination)." However, "pretext" is not the issue in the case at bar. This case turns on "uncontested" factual elements which establish a prima facie case under McDonnell Douglas.

> "A defendant whose answer fails to contest critical averments

in the complaint will, on motion, suffer a judgment on the pleadings that untruthful denials could have avoided." St. Mary's at 2755.

".... The plaintiff cannot be expected to refute 'reasons not articulated by the employer, but discerned in the record by the factfinder.'" St. Mary's at 2755.

".... there must be some device for determining which particular portion of the record represent articulated reasons set forth with sufficient clarity to satisfy McDonnell Douglas --- since it is only that evidence which plaintiff must refute." St. Mary's at 2756. (Emphasis ours).

PROPOSITION II

STRIKING THE AMENDED COMPLAINT CONSTITUTED A GROSS ABUSE OF DISCRETION AND RUNS COUNTER TO THIS COURT'S DECISION IN BALDWIN COUNTY WELCOME CENTER V. BROWN, 104 S.CT. 1723, 466 U.S. 147 (1984)

The Trial Court allowed Durham to amend her complaint within the "ninety day" jurisdictional time frame for

lodging a complaint after being issued a "right to sue letter" by the Equal Employment Opportunity Commission. Thereafter, Xerox filed a motion to strike the amended complaint. When the Court issued its order striking the amended complaint, the "ninety day" time frame for filing the Title VII claim had run. Thus, the Court, in effect, nullified Durham's right to file her Title VII action pursuant to 42 U.S.C. § 2000e-5(f)(1). The Court based its decision on "delay." The Trial Court's reasons for delay was totally without merit and the Appellate Court's failure to find an abuse of judicial discretion is clearly erroneous.

An analysis of the "delay" issue reveals the following: First, Durham was granted permission to file the amended

complaint, for whatever reason that the trial court relied upon, It did in fact grant Durham permission to file the amended complaint. Thus, the delay issue was moot from that point on and the only remaining issue was whether or not Xerox was prejudiced by the filing of the amended complaint. Obviously, the trial court considered It's docket, as well as its scheduling order when it granted permission to amend. Next, the analysis reveals that Xerox did in fact file an answer to the amended complaint. Ergo, the "delay" issue is further supported as being moot; and, once again, attention is directed to whether or not the defendant was thereby prejudiced. Therefore, on the face of the pleadings it is clear that "delay" is not an issue; for, as stated above, if it were an issue

then the trial court would have so stated.

Even though Durham's position is that "delay" was not an issue, and even if this Court somehow believed that it was an issue, there appear to be two general schools of thought among the circuits on the precise issue presented to this court --- whether undue delay alone is sufficient to deny an amendment under Rule 15 of the Federal Rules of Civil Procedure. The first view is evident in the Eighth Circuit's decision in Mercantile Trust Co. National Assoc. v. Inland Marine Prods. Corp., 542 F.2d 1010, 1012 (8th Cir. 1976), which held that "[m]ere delay is not a reason in and of itself to deny leave to amend. There must be found some prejudice that would result to others if leave were to be

granted." Mercantile Trust,, supra, 542 F.2d at 1012.

On the other hand, the Tenth Circuit held in Las Vegas Ice & Cold Storage Co. v. Far West Bank, 893 F.2d 1182, 1185 (10th Cir. 1990) that "untimeliness alone may be a sufficient basis for denial of leave to amend...Prejudice to the opposing party need not also be shown." See also Woolsey v. Marion Lab., Inc., 934 F.2d 1452, 1462 (10th Cir. 1991) (observing that the district court may deny leave to amend for untimeliness alone).

Neither Las Vegas Storage or Woolsey, is faithful to the Supreme Court's instructions in Zenith Radio Corp v. Hazeldine Research, Inc., 401 U.S. 321, 330-31, 91 S.Ct. 795, 802 (1971), requiring the court to take into

account the prejudice that the opposing party would suffer.

By departing from the Supreme Court instructions that "in deciding whether to permit such an amendment, the trial court was required to take into account any prejudice that Zenith would have suffered as a result", Zenith Radio Corp v. Hazeldine Research, Inc., 401 U.S. 321, 330-31, 91 S.Ct. 795, 802 (1971). The Appellate Court has failed to give full effect to the earlier pronouncement of this Honorable Court's decision in Foman v. Davis, 371 U.S. 178, 83 S.Ct. 227 (1962) that "Rule 15(a) declares that leave to amend shall be freely given when justice so requires: this mandate is to be heeded." Foman, 371 U.S. at 182, 83 S.Ct. at 230.

Thus, the issue in the case at bar

has to be whether leave to amend was improvidently granted. Under the rationale of Zenith and Foman, the answer must lie in whether Xerox was prejudiced by the amendment.

Durham showed that the same set of facts and circumstances were the basis for both her Title VII claim and her § 1981 claim. Durham showed that Xerox deposed her on four different days; on each occasion, the testimony continued for at least five hours, for a total of at least 20 hours of deposition testimony from Durham. Further, in Durham's response to interrogatories, she referenced the 1991 promotion of a Miss Hibbs, which was the basis of her Title VII claim. On the first day of her deposition, Durham informed Xerox that she had produced all the documents that

she had. Moreover, in Xerox' motion for summary judgment, it attached Durham's deposition testimony which spoke to the selection of Ms. Hibbs, which was the basis of Durham's Title VII action. This evidence, taken together with the fact that Xerox answered the Amended Complaint belies any notion that Xerox suffered any prejudice to the preparation of its defense. Finally, the court granted leave to file the amendment with the knowledge that the amendment was beyond the scheduling deadlines, which evidenced that the district court excused the delay. The abuse was in striking the Amended Complaint for untimeliness, after Xerox had answered, when indeed, Xerox had shown no prejudice.

Further, this Court held in Baldwin County Welcome Center v. Brown, Id. "[I]n

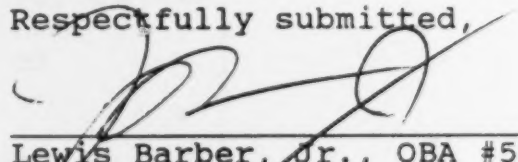
the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." Ergo, Durham verily believed that once the Trial Court allowed the amended complaint to be filed, that she had perfected her Title VII claim pursuant to 42 U.S.C. § 2000e-5(f)(1) --- "the court has led the plaintiff to believe that she had done everything required of her,..." Baldwin at 1725. Then only thereafter to strike the amended complaint without leave to file a new lawsuit, thereby subjecting Durham to the doctrine of res judicata.

CONCLUSION AND PRAYER FOR RELIEF

Wherefore premises considered, Petitioner respectfully prays that this Honorable Court grant her Petition for

Writ of Certiorari and thereafter reverse the decision of the Court of Appeals for the Tenth Circuit. Petitioner further prays that this Honorable Court grant her the costs of this Petition and a reasonable attorney fee.

Respectfully submitted,



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APPENDIX "A"

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

MARY P. DURHAM,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. CIV-92-92-L
	)	
XEROX CORPORATION, New York Corporation doing business in the State of Oklahoma,	)	
	)	
Defendant.	)	

JUDGMENT

Pursuant to the order issued this date, judgment is hereby entered in favor of defendant Xerox Corporation and against plaintiff Mary P. Durham.

Entered this 29th day of October, 1992.

TIMOTHY D. LEONARD
United States District Judge

ENTERED IN JUDGMENT DOCKET ON
10-29-92

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

MARY P. DURHAM,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. CIV-92-92-L
	)	
XEROX CORPORATION, New York Corporation doing business in the State of Oklahoma,	)	
	)	
Defendant.	)	

ORDER

On January 15, 1992, plaintiff, Mary P. Durham, filed this action under 42 U.S.C. § 1981 against defendant, Xerox Corporation, alleging that defendant failed to promote her to the position of Controller of its Oklahoma City plant because of her race. She seek equitable and injunctive relief, as well as compensatory and punitive damages. This matter is before the court on defendant's

motion for summary judgment.

Summary judgment is appropriate if the pleadings, affidavits, answers to interrogatories and deposition "show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Any doubt as to the existence of a genuine issue of material fact must be resolved against the party seeking summary judgment. In addition, the inferences drawn from the facts presented must be construed in the light most favorable to the nonmoving party. Board of Education v. Pico, 457 U.S. 853, 863 (1982). Nonetheless, a party opposing a motion for summary judgment may not simply allege that there are disputed issues of fact; rather, the party "must set forth specific facts

showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e) (emphasis added). See also, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." Anderson, 477 U.S. at 249-50 (citations omitted).

Defendant contends that it is entitled to judgment in its favor because plaintiff cannot prove an essential element of her claim: that the failure to promote her was due to purposeful race discrimination. Section 1981 provides that

> [a]ll persons within the jurisdiction of the United

> States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens . . . .

42 U.S.C. § 1981. The United States Supreme Court has held "that § 1981 can be violated only by intentional discrimination." General Building Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 391 (1982). Therefore, "plaintiff may avoid summary judgment only by producing specific evidence that [defendant's] actions were tainted by a discriminatory motive." Lewis v. City of Ft. Collins, 903 F.2d 752 (10th Cir. 1990).

Plaintiff has presented no evidence of discriminatory animus. In fact, the only evidence relevant to plaintiff's discrimination claim is that the position of Controller has been filled by

Caucasian employees.

> However, the burden placed upon the nonmoving party at the summary judgment stage to demonstrate a genuine issue of fact goes beyond the burden of producing "some evidence." A reasonable jury could not find discriminatory purpose based on this evidence alone.

Id. (emphasis in original). Plaintiff's argument that the failure to post for the position of Controller discriminates against black employees does not demonstrate discriminatory intent. As a neutral employment practice, the failure to post is cognizable under § 1981 only if it has a disproportionate impact on minorities and then "only if that impact can be traced to a discriminatory purpose." General Building Contractors Ass'n, 458 U.S. at 390 (quoting Personnel Administrator of Mass. v. Feeney, 442 U.S. 256, 272 (1979)). "Disparate impact

claims that do not 'raise a presumption of discriminatory purpose' are 'insufficient to sustain a cause of action under sections 1981 and 1983.'" Drake v. City of Ft. Collins, 927 F.2d 1156, 1162 (10th Cir. 1991) (quoting New Mexico ex rel. Candelaria v. City of Albuquerque, 768 F.2d 1207, 1209 (10th Cir. 1985)).

Plaintiff at all times bears the burden of proving that the failure to promote her was due to defendant's intentional discrimination. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981); Drake, 927 F.2d at 1162. As she has failed to make any showing on this essential element of her claim, defendant is entitled to summary judgment in its favor. See Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

Defendant's Motion for Summary Judgment is GRANTED. In light of this ruling, defendant's Motion to Remove Case from Jury Docket is DENIED as moot.

It is so ordered this 29th day of October, 1992.

TIMOTHY D. LEONARD
United States District Judge

ENTERED IN JUDGMENT DOCKET ON
10-29-92

APPENDIX "C"

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

MARY P. DURHAM,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	No. 92-6398
	)	
XEROX CORPORATION, a New York corporation doing business in the state of Oklahoma,	)	
	)	
Defendant-Appellee.	)	

Appeal from the United States District Court for the Western District of Oklahoma (D.C. No. CIV-92-0092-L)

Lewis Barber, Jr. (Guinise M. Marshall with him on the brief), Barber & Marshall P.A., Oklahoma City, Oklahoma, for Plaintiff-Appellant.

Carol Stephenson, P.C., Akin, Gump, Strauss, Hauer & Feld, L.L.P., Dallas, Texas, for the Defendant-Appellee.

Before ANDERSON, BALDOCK, Circuit Judges,

and KANE,*[1] District Judge.

ANDERSON, Circuit Judge.

Mary Durham appeals both the district court's summary judgment for Xerox Corporation on her claim under 42 U.S.C. § 1981 and the court's denial of leave to amend her complaint to include a claim under 42 U.S.C. § 2000e. Because Durham has not offered sufficient evidence to support a finding that Xerox intentionally discriminated against her because of her race, we affirm the summary judgment. We also hold that the district court did not abuse its discretion by striking Durham's amended complaint, because Durham waited three months to amend without any explanation

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[1] The Honorable John L. Kane, Jr., Senior Judge, U.S. District Court for the District of Colorado, sitting by designation.

or apparent reason.

BACKGROUND

Mary Durham has worked at Xerox's Oklahoma office since 1976 in various accounting jobs. In 1986 she became a senior financial analyst. In January, 1990, Xerox promoted a less senior white person to be controller of the Oklahoma office. Then about two years later the controller resigned, and Xerox gave the controller job to a less senior white woman from another office.[2] Xerox does

---

[2] At oral argument, Durham's attorney said that her § 1981 claim only applied to the 1990 promotion decision, during which no one talked to her about the controller job or gave her a chance to compete for it. Durham's original complaint made no such distinction, alleging both promotion decisions as grounds for relief under § 1981. Nor has Durham made this point at any time before oral argument. We therefore consider both promotion decisions, although it does not change the outcome. Durham cannot rely on disparate impact alone, and her disparate treatment claim is the same whether she was not given the job after some consideration or no

not post vacancies for upper-level management positions like controller, so Durham could not formally apply. However, she told her superiors that she wanted to be controller, and Xerox considered her for the job. Appellant's App. at 64-65, 81.

As a senior financial analyst, Durham's duties were the same as or similar to many of the controller's duties. However, her superiors felt that she was not qualified to be controller. Id. at 64-65, 78. Xerox claims that Durham did not have the required ten years experience in financial planning because she had only gathered data for others to use in financial planning. See id. at 122, 125, 130-33, 186. Xerox also suggests that Durham was not qualified for the controller job because her

---

consideration.

interpersonal skills were insufficient. Id. at 80.

Durham claimed that Xerox did not promote her because of her race, in violation of 42 U.S.C. § 1981. Three months after the agreed deadline for amended pleadings, and almost three months after receiving a right-to-sue letter from the EEOC, Durham moved to amend her complaint to claim a violation of 42 U.S.C. § 2000e. The district court initially granted the motion, but then struck the amended complaint on Xerox's motion. Xerox subsequently moved for summary judgment, which the district court granted. Durham appealed both the summary judgment and the order striking her amended complaint.

DISCUSSION

I. Summary Judgment

We review de novo whether Xerox is

entitled to summary judgment. See Thomas v. Wichita Coca-Cola Bottling Co., 968 F.2d 1022, 1024 (10th Cir.), cert. denied, 113 S.Ct. 635 (1992). We will affirm the summary judgment unless "the evidence, interpreted favorably to the plaintiff, could persuade a reasonable jury that the employer had discriminated against the plaintiff." MacDonald v. Eastern Wyoming Mental Health Ctr., 941 F.2d 1115, 1121-22 (10th Cir. 1991) (quoting Palucki v. Sears, Roebuck & Co., 879 F.2d 1568, 1570 (7th Cir. 1989)); see also Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-49 (1986) ("[S]ummary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.").

Durham says she sought relief on both disparate impact and disparate treatment theories, but she does not challenge the district court's rejection of her disparate impact claim. Xerox argues that Durham did not even plead a disparate treatment claim. Although Durham's complaint did not explicitly identify the elements of a disparate treatment claim, we think that she sufficiently pleaded disparate treatment. Nevertheless, Durham has not offered sufficient evidence to sustain her disparate treatment claim, so we affirm the summary judgment for Xerox.

Only intentional discrimination may violate section 1981. General Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 391 (1982). The allocation of burdens under Title VII applies to proving intentional discrimination under

section 1981 as well. Patterson v. McLean Credit Union, 491 U.S. 164, 186 (1989); Drake v. City of Fort Collins, 927 F.2d 1156, 1162 (10th Cir. 1991). Therefore we would presume intentional discrimination if Durham had presented a prima facie case and Xerox had not rebutted that presumption by offering a legitimate nondiscriminatory reason for not promoting Durham. See Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973). However, Xerox has rebutted Durham's prima facie case by explaining that the successful candidates were more qualified than Durham. [3] Therefore we do not

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[3] Xerox's evidence supporting this legitimate explanation applies to both promotion decisions. Durham first complained about not being interviewed for the controller job in 1989, during the time that Xerox was making the first promotion decision, and Xerox officials

presume discrimination and we must decide whether Durham has offered sufficient evidence that a reasonable jury could find that Xerox intentionally discriminated against her. St. Mary's Honor Ctr. v. Hicks, 113 S.Ct. 2742, 2749 1993) (explaining that the presumption of discrimination "simply drops out of the picture" once rebutted by the employer, and the trier of fact then must decide the ultimate question of intentional discrimination); Martin v. Nannie & the Newborns, Inc., 3 F.3d 1410, 1417-18 (10th Cir. 1993).

We agree with the district court that Durham has presented no direct

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told her then that she wasn't qualified. Appellant's App. at 64-65. Xerox gave the same reason for the second promotion decision. Furthermore, the evidence of particular weaknesses in Durham's record applies just as much to the first promotion decision as to the second decision.

evidence of discriminatory intent. See Durham v. Xerox Corp., No. CIV-92-92-L, slip op. at 2-3 (W.D. Okla. Oct. 29, 1992). Durham stresses that the job opening was not posted, but she neither alleges nor offers evidence to prove that the failure to post was intentionally discriminatory. She also claims that her superiors gave her artificially low ratings in her evaluations. However, she does not offer any evidence to suggest that they did so with discriminatory intent. Furthermore, she has not presented comparative evidence to show that her average ratings were inconsistent with Xerox's evaluation of others. She only says that she thinks she is better than average, and that she must be better than average because she has done her job and has not been fired during her sixteen years at Xerox. See

Appellant's App. at 65-66, 179-80. Her disagreement with a subjective evaluation obviously does not prove discriminatory intent, and Xerox has shown that it retains and even promotes employees with average ratings. See id. at 72-73.

Durham also tries to prove intentional discrimination indirectly by showing that she was more qualified than those promoted to the controller job. The district judge apparently ignored this evidence because he thought that it could not possibly prove discriminatory intent. However, proof that Durham was more qualified would disprove Xerox's only explanation for its actions, that Durham was less qualified than the successful candidates. Although a prima facie case combined with disproof of the employer's explanation does not prove intentional discrimination as a matter of

law, it may permit the factfinder to infer intentional discrimination, and thus preclude summary judgment for the employer. St. Mary's Honor Ctr., 113 S.Ct. at 2749, 2751-52 ("The factfinder's disbelief of the reasons put forward by the defendant . . . may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination. . . ."); see also Patterson, 491 U.S. at 187-88; United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 714 n.3, 717 (1983) ("The District Court erroneously thought that respondent was required to submit direct evidence of discriminatory intent. . . ."); Burdine, 450 U.S. at 256.

Nevertheless, Durham has not offered sufficient evidence to support a finding that Xerox's stated reason was a pretext for discrimination.[4] Almost all of Durham's evidence would only support a finding that she was qualified for the controller job, not that she was more qualified than those promoted. She does assert that she was more qualified because she had more experience than those who got the job, but her own description of her experience supports

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[4] We disagree with Durham's suggestion that Xerox has conceded Durham's ability to prove pretext. Xerox has only said that it did not "seek summary judgment on the basis of Durham's inability . . . to show . . . pretext." Appellant's App. at 189. Xerox instead has argued simply that Durham's evidence is insufficient to support a finding of intentional discrimination. Xerox incorrectly thought that proof of pretext could not prove intentional discrimination, but that does not mean it concedes Durham's ability to prove pretext. In fact, Xerox directly stated that it did not concede that Durham could prove pretext. Id.

Xerox's claim that her experience was only gathering financial data, not financial planning. See Appellant's App. at 122, 125, 130-33. Furthermore, she has produced no evidence of the successful candidates' experience to compare to her own. See id. at 62-63. Mere seniority does not support a finding that she was more qualified for a different job. Her only other comparative evidence is her testimony that she trained the controllers. See id. But this only shows that Durham had experience with some specific tasks that the controllers would have to perform, not that she generally had better evaluations, financial planning experience, interpersonal skills, management experience, conceptual skills, or organizational skills.

Xerox does not violate section 1981

by choosing better or even equally qualified white candidates over a qualified black candidate unless it did so with discriminatory intent. Burdine, 450 U.S. at 259. Durham has not produced sufficient evidence to support a finding that Xerox did not choose the successful candidates simply because they were better candidates. Without proof of pretext of direct evidence of discriminatory intent, Durham cannot meet her ultimate burden of proving intentional discrimination.

II. Order Striking Amended Complaint

The district court initially granted Durham's motion to add a Title VII claim to her complaint, but granted a motion to strike the amended complaint after Xerox challenged the court's decision. We must sustain the district court's order unless the court abused its discretion. Woolsey

v. Marion Lab, Inc., 934 F.2d 1452, 1462 (10th Cir. 1991).

The district court rejected Durham's amendment because she had not shown any cause for failing to add a Title VII claim earlier as directed by the scheduling order, and also because the amendment would prejudice Xerox. Appellant's App. at 44. Durham filed her amended complaint three months after the scheduling order deadline for such amendments, yet never explained the delay. This unexplained delay alone justifies the district court's discretionary decision. See Woolsey, 934 F.2d at 1462 (observing that district court may deny leave to amend for untimeliness alone); Las Vegas Ice & Cold Storage Co. v. Far West Bank, 893 F.2d 1182, 1185 (10th Cir. 1990) ("Untimeliness alone may be a sufficient

basis for denial of leave to amend. . . . [P]rejudice to the opposing party need not also be shown.") We therefore need not address Durham's claims that the amendment would not have prejudiced Xerox.[5]

We deny Durham's motion to supplement her brief because her original brief "adequately addressed the issues on

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[5] Durham's attorney raised three new issues at oral argument. For the first time, he tried to explain the delay. He also argued that Rule 12(f) prevented Xerox's motion to strike because it had already answered the motion, and that 42 U.S.C. § 200e-5(f)(1) guarantees that Durham may file a complaint 90 days after receiving a right-to-sue letter. We disregard these arguments because Durham did not raise them before the district court or in her brief. See White v. Commissioner, 991 F.2d 657, 661 (10th Cir. 1993) ("[W]e generally do not review matters raised for the first time on appeal."); United States v. Osterlund, 671 F.2d 1267, 1267 n.2 (10th Cir. 1982) ("Because this issue was raised for the first time during oral argument, we need not reach this issue on appeal.") However, we doubt that any of these arguments would change our decision even if we did consider them.

appeal." Castner v. Colorado Springs Cablevision, 979 F.2d 1417, 1423 (10th Cir. 1992) We AFFIRM summary judgment in Xerox's favor, and AFFIRM the district court's order striking Durham's amended complaint.

APPENDIX "D"

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MARY P. DURHAM,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	No. 92-6398
	)	D.C.#CIV-92-
XEROX CORPORATION, a New York corporation doing business in the state of Oklahoma,	)	0092-L
	)	
	)	
	)	
	)	
Defendant-Appellee.	)	

ORDER
Entered March 15, 1994

Before ANDERSON and BALDOCK, Circuit Judges, and *KANE, District Judge

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*The Honorable John L. Kane, Jr., of the United States District Court for the District of Colorado, sitting by designation.

This matter comes on for consideration of appellant's petition for rehearing.

Upon consideration whereof, the petition for rehearing is denied.

Entered for the Court

ROBERT L. HOECKER, Clerk

By Patrick Fisher
Chief Deputy Clerk

APPENDIX "E"

Rule 15. Amended and Supplemental Pleadings

(a) Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleadings is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court

otherwise orders.

(b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to

satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

(c) Relation Back of Amendments. An Amendment of a pleading relates back to the date of the original pleading when

(1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or

(2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or

(3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within

the period provided by RUle 4(m) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party. The delivery or mailing of process to the United States Attorney, or United States Attorney's designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of subparagraphs (A) and (B) of this paragraph (3) with respect to the United States or any agency or officer thereof to be brought into the action as a

defendant.

(d) **Supplemental Pleadings.** Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit the party to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.

APPENDIX "F"

Rule 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defendant Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may service opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it an by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposes by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading,

but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

APPENDIX "G"

42 U.S.C. § 2000e-5(f)(1)

(f) Civil actions by Commission, Attorney General, or person aggrieved; preconditions; procedure; appointment of attorney; payment of fees, costs, or security; intervention; stay of Federal proceedings; action for appropriate temporary or preliminary relief pending final disposition of charge; jurisdiction and venue of United States courts; designation of judge to hear and determine case; assignment of case for hearing; expedition of case; appointment of master.

(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall

have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or politicial subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case

involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.